

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Price Cap Regulation of)
Local Exchange Carriers) CC Docket No. 93-179
)
Rate-of-Return Sharing)
and Lower Formula Adjustment)

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To: The Commission

**EMERGENCY MOTION FOR STAY
PENDING JUDICIAL REVIEW**

The Ameritech Operating Companies ("Ameritech"), by and through their undersigned counsel, hereby request an emergency stay of the effectiveness of the Commission's "Add-back Adjustment" rule adopted in the *Report and Order* in CC Docket No. 93-179, *Price Cap Regulation of Local Exchange Carriers: Rate-of-Return Sharing and Lower Formula Adjustment*, FCC 95-133 (released April 14, 1995) ("*Add-back Order*"), pending judicial review of the Commission's action in the *Add-back Order*. Concurrently with the filing of this emergency motion, Ameritech is also filing with the United States Court of Appeals for the District of Columbia Circuit a petition for review of the *Add-back Order*.

Ameritech seeks the instant stay to prevent the unwarranted and substantial harm it would suffer as a consequence of the application of the new add-back adjustment rule to the tariffs it must file later this summer. The stay is sought on an emergency basis because Ameritech must file its preliminary annual price cap index adjustment reports with the Commission on May 9, 1995. Because these filings are prepared in anticipation of the tariff filings later in the year, the Commission's add-back methodology must be applied immediately, notwithstanding the later effective date of the *Add-back Order*. See *Cost*

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Support Material to be Filed with 1995 Annual Access Tariffs, DA 95-823 (released April 14, 1995) at 7 ¶ 16.

When determining whether to stay one of its actions, the Commission considers four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood of irreparable injury to the requesting party in the absence of a stay; (3) the injury to other parties arising as a consequence of granting the stay; and (4) the potential for injury to the public interest. *Storer Communications, Inc.*, 101 F.C.C.2d 434, 451 (citing *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)). As demonstrated herein, each of these factors weighs in favor of a stay in the instant case.

I. AMERITECH IS LIKELY TO PREVAIL ON THE MERITS OF ITS CHALLENGE TO THE "ADD-BACK" ADJUSTMENT

First, the analytical deficiencies underlying the Commission's "add-back" rule make it highly likely that Ameritech will succeed before the Court of Appeals. As an initial matter, the Commission based its decision in CC Docket No. 93-179 largely on its opinion that sharing under price caps operates essentially the same as a refund under rate of return regulation. *See, e.g., Add-Back Order*, ¶¶ 23, 32, 41. In particular, the Commission noted that "both mechanisms are designed to return to ratepayers in year 2 a portion of the carrier's earnings from the prior year." *Id.* ¶ 32. Such a view of sharing, however, is legally unsustainable because the Commission has no authority to compel a refund of any portion of a carrier's earnings unless it finds that the earnings are unlawful. Moreover, the sharing mechanism itself is so constructed that it cannot be logically argued that it merely requires the refund of unlawful earnings over 12.25 percent (or 13.25 percent, as the case may be) because only 50 percent of the "overearnings" are refunded.

Rather, the only legally supportable view of sharing is that it is a forward-looking adjustment to the carrier's productivity offset to reflect the fact that the carrier's earnings show that the carrier is more productive than the target, and to share that productivity gain with customers. If, however, sharing is effectively an adjustment to a carrier's productivity offset, then it is arbitrary and capricious for the Commission to require that the effects of sharing be ignored when calculating the carrier's earnings for the subject year. In other words, all of the productivity offset (including the adjustment to reflect "sharing") must be considered when looking at a carrier's earnings to evaluate its productivity performance for the subject year.

In addition to the foregoing defects with the Commission's rationale for its "add-back" requirement, a second basis for reversal of the rule exists: application of the *Add-back Order* to require the "add-back" of sharing to evaluate earnings that took place before the effective date of the order, as the Commission has done in the instant case,^{1/} constitutes impermissible retroactive rulemaking.

II. AMERITECH WILL SUFFER IRREPARABLE INJURY WITHOUT A STAY OF THE RULE

The reasoning set forth in the preceding section reveals the unlawfully arbitrary nature of the "add-back" rule. However, more acute than the rule's capriciousness is the unwarranted injury visits upon the carriers subject to it. Applied according to the Commission's rationale, the rule leads to a dramatic mischaracterization of carrier earnings, with immediate and direct consequences for the formulation of the indices that will control the carrier's price cap for the forthcoming year. Without justification, the rule imposes an

^{1/} See *Cost Support Material to be Filed with 1995 Annual Access Tariffs*, DA 95-823 (released April 14, 1995) at 7 ¶ 16.

obligation to "return" substantial sums of earnings that were lawfully obtained. Moreover, the injury becomes irreparable because, once memorialized in the carrier's tariff, it is not at all clear that the Commission will permit carriers to recover those lost earnings later in the likely event that the Court of Appeals overturns the rule.

**III. A STAY WOULD NOT INJURE OTHER PARTIES AND WOULD
BENEFIT THE PUBLIC INTEREST**

Finally, no other parties would be injured by the forbearance requested during the Court's examination of these issues. The stay would merely preserve the status quo. Because the rule proposes a new methodology for calculation of the annual adjustments, the stay would not disturb any long-held expectations upon which carriers or the public have come to rely. Moreover, in the unlikely event the Court upholds the rule, the Commission will have the opportunity to revisit the issue to recover alleged excesses in future years.

The public interest would also be served best by staying the effectiveness of the rule until the Court has had the opportunity to scrutinize it more closely. Enforcement of an unlawful rule is *ipso facto* contrary to the public interest. However, that consideration weighs even more heavily where, as here, the rule in question promises such dramatic and damaging consequences for carriers that may be felt in diminished quality of service to the public.

IV. CONCLUSION

For the foregoing reasons, Ameritech respectfully request the Commission act expeditiously to grant a stay of the *Add-Back Order*.

Respectfully submitted,

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Dated: April 28, 1995

CERTIFICATE OF SERVICE

I hereby certify that I have this twenty-eighth (28th) day of April, 1995, sent copies of the foregoing "Emergency Motion for Stay Pending Judicial Review" by first class United States mail, postage prepaid, to the following parties to the above-captioned proceeding:

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